



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

(petitioner)

DECISION

MDV-66/50525

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**PRELIMINARY RECITALS**

Pursuant to a petition filed September 14, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Washington County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on December 18, 2001, at West Bend, Wisconsin. At the request of petitioner, a hearing set for October 24, 2001 was rescheduled. At the request of both parties, the record was held open until March 15, 2002 for the submission of briefs to the Division of Hearings and Appeals (DHA). The petitioner's initial and reply briefs were submitted by Attorney Robert Alexander. The county agency's brief was submitted by Washington County Attorney Christine Ohlis. The parties timely submitted the briefs to DHA.

In an April 23, 2001 hearing before DHA, the same petitioner, represented by the same counsel, Attorney Robert Alexander, appeared before ALJ Nancy Gagnon in Case No. MDV-66/48085. This case involved many of the same facts as the instant case, and also addressed the issue as to whether the county agency had correctly denied petitioner's MA application (but that decision focused on the full market value of a condominium and the full value of a private annuity- not just petitioner's life estate interest). At the time of the April 23, 2001 hearing, the county agency indicated that it was unaware that (petitioner's spouse) had died on January 13, 2001.

ALJ Gagnon issued a final decision in Case No. MDV-66/48085 on July 18, 2001. In that decision, ALJ Gagnon concluded: 1) The county agency incorrectly determined the amount of property divested by the petitioner in April, 1999; the county agency should have subtracted the values of two life estate interests (\$38,470.84 and \$32,937.97) from the divested condominium's \$130,600 fair market value in the divestment computation; 2) The county agency correctly determined that only the actual monthly payments made from the private annuity to (petitioner's spouse) can be treated as returns of divested property, pursuant to Wis. Admin. Code §HFS 103.065(4)(d)2c; and 3) The petitioner's motion to dismiss that proceeding due to defective notice from the county agency was denied.

ALJ Gagnon ordered the county to redetermine the amount of the petitioner's April, 1999, divestment into the Trust by subtracting the life estate values for the petitioner and her husband (\$38,470.84 and \$32,937.97) from the \$130,600 fair market value of the property interest placed into said Trust. That redetermination would also change the length of the petitioner's disqualification from institutional MA.

The issue for determination in this appeal is whether the county agency correctly denied petitioner's MA application due to the divestment of the petitioner's life estate interest to the irrevocable trust.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)

Represented by:

Attorney Robert G. Alexander  
Alexander & Klemmer S.C.  
2675 North Mayfair Road, Suite 304  
Wauwatosa, WI 53226

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Attorney Christine Ohlis, written submission  
Office of County Attorney  
432 E. Washington Street  
P.O. Box 1986  
West Bend, WI 53095-7986

By: Maxine Ellis, ES Supervisor, ESS  
Washington Co Dept Of Social Services  
333 E. Washington Street  
Suite 3100  
West Bend, WI 53095

**ADMINISTRATIVE LAW JUDGE:**

Gary M. Wolkstein  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) has been a resident of a nursing home in Washington County since October 30, 2000. The petitioner's husband resided in the community in the couple's principal residence which was their condominium located at (x) Street, West Bend, Wisconsin.
2. Shortly after the April 23, 2001 hearing in Case No. MDV-66/48085, the county agency discovered through the West Bend Daily News that (petitioner's spouse) had died on January 13, 2001. See Exhibit 4.
3. An application for institutional MA was filed on petitioner's behalf on December 19, 2000. The county agency issued a notice to the petitioner on January 19, 2001, which advised that she would only be eligible for MA "card services" for a period of time, due to asset divestment. On January 29, 2001, the agency notified the petitioner that her institutional charges disqualification period would run through March, 2002.

4. On April 5, 1999, the petitioner and her husband entered into an irrevocable trust agreement (Trust), as settlors. The Trust names their daughter as trustee. The beneficiaries of the Trust are (trustee) and another daughter of the petitioner's. The assets placed into the Trust include the remainder interest in a condominium located at (x) Street, West Bend, Wisconsin, three life insurance policies, two commercial annuities, a checking account and a car. The county agency determined that the value of the Trust's assets in 2000 was \$183,188.01. The value of the assets other than the condominium totaled \$52,588.
5. The fair market value of the petitioner's condominium in April, 1999, before subtraction of life estate interests, was \$130,600. At the time of the April 5, 1999, property transfer to the Trust, the petitioner and her husband retained life estate interests in the condominium property: a) the petitioner's life estate value was \$38,470.84 and petitioner's husband's life estate value was \$32,937.97.  $\$130,600 - \$38,470.84 - \$32,937.97 = \$59,191.19$ . See Exhibit 1
6. (petitioner's spouse) life estate interest ended upon his death on January 13, 2001
7. In the April 5, 1999 warranty deed, the petitioner's life estate interest did not terminate until the earliest of the following events: a) the death of the last surviving grantor; 2) the conveyance, sale, assignment, gift or other transfer of all the said grantors' rights, titles and interests in the property, or: 3) *At such time as **both** grantors no longer occupy said property as their principal residence for an uninterrupted period of 120 days, at which time all the grantors' rights to the use and occupancy of the premises shall terminate.* (emphasis added) See Exhibit 10, page 2. 120 days after (petitioner's spouse) January 13, 2001 death was May 13, 2001.
8. On October 2, 2000, a private annuity agreement was created with (x) as trustee and (petitioner's spouse) as the annuitant. The private annuity was funded by a remainder interest in the condominium, and the same three life insurance policies, two annuities, checking account and car. The annuity agreement declares that the value of these assets in October, 2000, was \$65,000. Level payments of \$721.63 monthly to the annuitant began on October 1, 2000. This annuity does not have a balloon payment on its stated maximum ending date of October 1, 2010. Per the terms of the agreement, no person is paid any funds after (petitioner's spouse) demise.
9. The county agency determined that a second divestment event occurred when petitioner's life estate interest in the condominium was sold to the (petitioner) Irrevocable Trust on March 16, 2001. The gross proceeds of that sale were in the amount of \$129,038.71. See Exhibits 4 & 7. The net amount of the sale, \$95,006.75 was paid solely to the (petitioner) Irrevocable Trust. See Exhibit 7.
10. The county agency sent an August 17, 2001 manual negative notice to the petitioner stating that her MA application was denied due to divestment due to the March 16, 2001 sale of petitioner's life estate interest in the condominium property to the (petitioner) Irrevocable Trust. See Exhibit 8.
11. The second divestment was the amount of petitioner's life estate interest, \$38,470.84. The county agency notified petitioner that she was only eligible for MA card services from March 16, 2001 through June 30, 2002 (prior divestment ineligibility ended March 31, 2002). See Exhibit 9.
12. The petitioner filed an appeal of the August 17, 2001 negative notice on September 14, 2001 with the Division of Hearings and Appeals.

## DISCUSSION

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; MA Handbook, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; Handbook, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as “MA card services” in the parlance). The penalty period is specified in WI Stat § 49.453(3). It is the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently \$4,075). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. See also MA Handbook, Appendix 14.5.0.

The Wisconsin State statutes, administrative code and MA Handbook all provide directives regarding the classification and treatment of a divestment of assets. Wis. Stat. § 49.453, Divestment of Assets, provides the specifics as follows:

Wis. Stat. § 49.453(2)(a) states:

**(2) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES.**

(a) Institutionalized individuals. Except as provided in sub. (8), if an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, transfers assets for less than fair market value on or after the institutionalized individual’s look-back date, the institutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3):

1. For nursing facility services.
2. For a level of care in a medical institution equivalent to that of a nursing facility.

(emphasis added)

The Wisconsin Administrative Code § HFS 103.065(4)(a) defines “divestment” as follows:

(4) DIVESTMENT. (a) Divestment resulting in ineligibility. An institutionalized individual or someone acting on behalf of that individual *who disposes of resources at less than fair market value* within 30 months immediately before or at any time after the individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not receiving MA on that date, within 30 months immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. (emphasis added)

The MA Handbook states: “Divestment” is the transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person or his/her spouse or both:

1. For less than the fair market value of the income or asset
2. By an institutionalized person

MA Handbook, Appendix 14.2.1

In this case, the petitioner and her husband established their joint Irrevocable Trust Agreement on April 5, 1999. The creation of the irrevocable trust and the transfer of funds by the petitioner and her husband into that irrevocable trust on April 5, 1999 were the events that triggered the first divestment. See Finding of Fact #4 above.

The controlling state statute, Wis. Stat. §49.454, specifically addresses the treatment of trusts for MA purposes. Subsection (1) states that the section applies to a trust if assets of the individual or the individual’s spouse were used to form all or part of the corpus of the trust and the trust was established by the individual or the individual’s spouse. Wis. Stat. § 49.454(3) specifically addresses **divestment of assets to irrevocable trusts**; Subsection (3)(b) states:

Any portion of an irrevocable trust from which, or any income from the corpus from which, no payment could under any circumstances be made to or for the benefit of the individual, is considered to be an asset transferred by the individual subject to s. 49.453. The asset is considered transferred as of the date of the establishment of the trust, or, if later, the date on which payment to the individual was foreclosed. The value of the trust shall be determined for purposes of s. 49.453 by including the amount of any payments made from that portion of the trust after that date.

Irrevocable trusts, are subject to a 60 month “lookback” period for divestment testing, at application, in order to make an initial eligibility determination at all. See, WI Stat § 49.453(1)(f). The trust at issue here falls within the 60 months prior to application. In this case, the April 5, 1999 irrevocable trust was created about one and one half years before petitioner’s MA application date of December 19, 2000.

A transfer into an irrevocable trust, where the MA applicant/recipient’s assets form the trust, and where there are no circumstances where payments can be made to the applicant/recipient, is described specifically in 42 U.S.C. 1396p(d)(3)(B)(ii) as being a divestment. See also Wis. Stat. §49.454(3)(b); MA Handbook, App. 14.12.2 (currently renumbered as 14.13.2). 42 U.S.C. 1396p(d)(4) describes exceptions to that rule. Exceptions are so-called Special Needs Trusts, which provide that the state will be repaid any MA payments upon the individual’s death, and pooled trusts for disabled individuals. See also Wis. Stat. §49.454(4).

The trust established on April 5, 1999 on petitioner’s behalf clearly falls into the definition of divestment, and it also does not meet a specified exception. It is the act of creating the Irrevocable Trust and the funding of that Irrevocable Trust that clearly created the first divestment in Case No. MDV-66/48085. The MA Handbook provides in pertinent part confirmation that funding of an irrevocable trust is a divestment:

#### **14.13.2 (f/k/a 14.12.2) “Irrevocable Trusts**

An irrevocable trust is a trust that cannot in any way be revoked by the grantor.

The following actions are divestments if they took place during the lookback period or any time after:

1. **An irrevocable trust was created. The divested amount is the total amount of the created trust.**
2. Funds were added to the irrevocable trust. The divested amount is the amount of the added funds.

If either of these actions took place before the lookback period, apply the following rules:

1. Payments to the institutionalized person from trust income or from the body of the trust are income.
2. Payments that could be disbursed to the institutionalized person from trust income or from any portion of the body of the trust but that are not disbursed are available assets.
3. **Payments from the trust to anyone other than the institutionalized person are divestment.**

(emphasis added).

On August 17, 2001, the county agency sent a manual negative notice to the petitioner indicating that her MA application was denied due to a second divestment event, the March 16, 2001 sale of petitioner’s life estate interest in the condominium. This notice indicated a second divestment had occurred due to the sale of the condominium property to the (petitioner) irrevocable Trust on March 16, 2001. The petitioner did not receive any compensation for the value of her life estate which was “sold” to the irrevocable trust. As a result, the county agency determined that petitioner was only eligible for MA card services from March 16, 2001 (date of sale of petitioner’s life estate interest) through June 30, 2002.

A pertinent portion of the Department’s policy handbook states:

#### **14.10.0 Life Estates**

When a person conveys a life estate (11.7.5) to himself/-herself and designates a remainder person (11.7.5), the amount of remainder interest is considered an asset transfer. If the transfer was for less than fair market value, treat it as a divestment. ...

**It is also divestment if the life estate holder transfers the life estate interest for less than fair market value.**

...

(emphasis added)

*MA Handbook*, Appendix 14.10.0.

The petitioner's attorney was unable to provide any evidence that petitioner had been compensated for her life estate interest when that life estate was sold to the trust on March 16, 2001. Attorney Alexander attempted unpersuasively to argue in his initial and reply brief that no second divestment had occurred because both life estate interests in the condominium had expired prior to the March 16, 2001 sale of petitioner's life estate interest in the condominium to the irrevocable trust. See also Attorney Alexander's January 3, 2002 Affidavit, paragraph #8. The petitioner's attorney was correct (petitioner's spouse) life estate did end as of his death on January 13, 2001 and there was no divestment of that life estate. However, his argument that (petitioner) life estate ended 120 days after her October 30, 2000 entrance into her nursing home lacked any merit and contradicted the clear and plain language of the pertinent Warranty Deed of April 5, 1999. See Exhibit 10, page 2.

In the April 5, 1999 warranty deed, the petitioner's life estate interest did not terminate until the earliest of the following events: a) the death of the last surviving grantor; 2) the conveyance, sale, assignment, gift or other transfer of all the said grantors' rights, titles and interests in the property, or: 3) *At such time as **both** grantors no longer occupy said property as their principal residence for an uninterrupted period of **120 days**, at which time all the grantors' rights to the use and occupancy of the premises shall terminate.* (emphasis added) See Exhibit 10.

The section of the April 5, 1999 warranty deed at issue in this appeal is section #3. That section states in pertinent part that "... **BOTH** grantors no longer occupy said property." (petitioner's spouse) occupied the property as his residence until his January 13, 2001 death. The October 30, 2000 entrance of (petitioner) into a nursing home is irrelevant to the start of the 120 period referred to in the April 5<sup>th</sup> warranty deed. The 120-day period did not begin to run until (petitioner's spouse) death on January 13, 2001, when (petitioner and spouse) were both no longer occupying the property (condominium) in question. As a result, the county agency was correct that the petitioner did retain a life estate interest in the condominium at the time of the March 16, 2001 sale of the property to the irrevocable trust because the warranty condition (120 period) had not expired. Therefore, the sale of petitioner's life estate interest to the irrevocable trust for no compensation was a second divestment.

After the county presented its case, the burden of proof shifted to the petitioner to establish that no second divestment had occurred. In other words, the petitioner had the burden of proof to rebut the presumption that divestment of petitioner's life estate interest had occurred with the March 6, 2001 sale of her life estate to the irrevocable trust. While the petitioner contended repeatedly that both life estates legally terminated prior to the March 16<sup>th</sup> sale of the property, the petitioner failed to meet its burden to establish such termination. The petitioner also failed to refute the county's case and the clear wording of the April 5, 1999 Warranty Deed.

The petitioner's representative also contended unpersuasively that the Department "waived" its right to raise the issue of the life estates interests in this appeal as that issue could have been raised at the prior hearing in Case No. MDV-66/48085. This contention is without merit. In her March 1, 2002 brief, Attorney Christine Ohlis presented convincing arguments to support the county's testimony (at the December 18, 2001 hearing) that the county was not aware that (petitioner's spouse) had died on January 13, 2001 until after the April 23, 2001 hearing in Case No. MDV-66/48085. While Mr. Alexander did produce a copy of a January 15, 2001 faxed letter to the county (Exhibit 2), there was no reliable evidence presented to confirm that the county received such letter. In their sworn testimony, both ES Supervisor Ellis and ESS Clune denied receiving Exhibit 2. Furthermore, on page 4 of ALJ Gagnon's July 18, 2001 decision, Attorney Gagnon indicated that the county agency was not informed by the petitioner that she had sold the condominium to the trust on March 16, 2001. See Exhibit 1 The petitioner failed to provide any timely and required notice to the county of this March 16, 2001 divestment event for the county to issue a new negative notice prior to the April 23<sup>rd</sup> hearing. See Exhibits 3 and 1. Based upon the totality of the circumstances, this ALJ found the testimony of the county witnesses (ES Supervisor Maxine Ellis and ESS Jane Clune) to be credible and reliable regarding not being aware that (petitioner's spouse) had

died or that her life estate interest had been sold prior to the April 23<sup>rd</sup> hearing before Attorney Gagnon. Therefore, this ALJ concludes that there was no prior opportunity for the county agency to address the issue of the second divestment resulting from the sale of petitioner's life estate interest to the irrevocable trust.

### **CONCLUSIONS OF LAW**

1. The county agency correctly determined that a second divestment occurred on March 16, 2001, when petitioner's life estate interest of \$38,470.84 in the condominium was sold without compensation to the irrevocable trust.
2. The county agency correctly determined a second divestment ineligibility period from March 16, 2001 through June, 2002 due to petitioner's divestment of her life estate interest in the condominium.

**NOW, THEREFORE, it is ORDERED**

That the matter for review herein be and the same is hereby dismissed.

### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.



The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2002.

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Gary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals  
423/GMW